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No. 78-618

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM THOMAS PINNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner challenges his conviction for willful failure to file employer's quarterly federal tax returns on the ground that the courts below ignored the stipulated facts.

Following a non-jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of six counts of failing to file returns reporting income taxes and social security

taxes withheld from wages of employees, in violation of 26 U.S.C. 7203 (Pet. App. 3a-4a). The trial court sentenced him to a one-year prison term, all but 30 days of which was suspended, placed him on probation for three years, and imposed a $1,000 fine. The court of appeals vacated the conviction and remanded the case to the trial court for specific factual findings (Pet. App. 1a-12a) (561 F.2d 1203). The trial court again entered a judgment of conviction (Pet. App. 12a-14a), and the court of appeals thereafter affirmed (Pet. App. 15a-17a).

The evidence showed that petitioner owned and operated a sole proprietorship that sold footwear. During the last two quarters of 1973 and all four quarters of 1974, petitioner failed to file tax returns reporting the income taxes and social security taxes withheld from the wages of his employees (Pet. App. 5a).

The case was tried entirely on stipulations, which permitted the government to introduce two exhibits into evidence (Pet. App. 4a). The first exhibit contained summaries of interviews by Internal Revenue Service representatives with petitioner (Pet. App. 5a). The first interviews were conducted by Kathy Howell, Taxpayer Service Representative for the Internal Revenue Service, in March 1974 (Pet. App. 5a-6a). In her summary of the interviews, Howell stated that although she did not recall the specific conversations with petitioner, she could state that petitioner did not present any questions concerning his requirement to file or pay. She explained that had

there been any question concerning petitioner's ability to pay the taxes, she would have made a notation and informed him that even if he could not pay, he should file the returns and he then could discuss payment with the Revenue Officer. (Pet. App. 6a n.3).

In March 1975, Revenue Officer Lynn D. Mathis interviewed petitioner (Pet. App. 6a). In his summary of this interview, Mathis stated that when he asked petitioner why the returns for the six quarters had not been filed, petitioner stated that the returns had not been filed and taxes paid because of pressing business affairs, procrastination, and a shortage of working capital (Pet. App. 6a n.4).

Two months later, Special Agent Larry Wine and Revenue Officer Mathis contacted petitioner (Pet. App. 6a). In his summary of this interview, Wine reported that petitioner stated he did not know that he could file the returns without paying the taxes; that he had not filed the returns because he "was going in too many directions," was too involved in other businesses, and procrastinated; that he intended to let the problem "slide;" that he probably could have borrowed the money to pay the taxes, "but just didn't do it;" and that he filed state tax forms and not the federal tax forms because he had the money to pay the state taxes (Pet. App. 6a-8a n.4). In a subsequent interview with Wine and Mathis held several days later, petitioner stated that he could have filed the returns but did not and that he had not been aware that he could file them without paying the taxes (Pet. App. 7a-8a).

The government rested its case after introducing the two exhibits (Pet. App. 4a). Following a verdict of guilty, the district court, pursuant to petitioner's request, entered findings of fact and conclusions of law in which the court recited that the failure to file returns for each of the taxable periods in question "was a knowing and willful failure" (Pet. App. 4a-5a n.2). On the first appeal, the court of appeals stated that the trial court had not made a specific finding as to petitioner's credibility during his interviews with the revenue agents and noted that it could not be said that petitioner had acted willfully if he had honestly believed that he was not required to file if he could not pay the taxes owed (Pet. App. 9a). The court therefore remanded to the trial court for a specific finding with respect to petitioner's credibility (*ibid.*).

On remand, the district court again determined that petitioner's failures to file were willful (Pet. App. 12a). The court based this finding on the fact that in the first three interviews petitioner did not question the Service representatives as to how he could file when he was unable to pay and, in fact, indicated in the third interview that he was aware that the returns should have been filed and that procrastination, pressing business affairs, and a shortage of working capital were the reasons he had not filed (Pet. App. 12a-13a). The court concluded that petitioner's subsequent remarks during interviews with Special Agent Wine that he was unaware he could file without making immediate payment were unworthy of belief when compared with the statements in his prior interviews, together with his admission that procrastination was the reason for his failures to file (Pet. App. 13a).

Petitioner argues (Pet. 6-10) that there is no basis for a finding that his statements were unworthy of belief because the stipulation provided that "all of the statements contained in the exhibits * * * are true, complete and correct" (Pet. 4). But the stipulation did not provide that all of petitioner's statements to the agents were worthy of belief. The import of the stipulation was that petitioner had in fact made all of the statements as reported by the agents. The trial court's conclusion that one of petitioner's statements was credible as compared with the others was not in derogation of the stipulation.

The cases relied on by petitioner (Pet. 8)[1] do not conflict with the decision below. They simply stand for the proposition that a stipulation as to a matter of fact is binding on the court and the parties. In each of those cases, however, the parties agreed to the existence of a single fact. Here, on the other hand, the parties agreed that petitioner had made inconsistent statements. The trial court did not find that any one or all of the statements had not been made. Rather, it accepted the parties' agreement that

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[1] *H. Hackfeld & Co.* v. *United States*, 197 U.S. 442 (1905); *United States* v. *Houston*, 547 F.2d 104 (9th Cir. 1976); *United States* v. *Campbell*, 453 F.2d 447 (10th Cir. 1972); *Jackson* v. *United States*, 330 F.2d 679 (8th Cir. 1964); *United States* v. *Kahriger*, 210 F.2d 565 (3rd Cir. 1954).

the statements had been made, but determined which of these inconsistent statements was credible.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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